

# **CRIMES OF AGGRESSION**

A historical outline and an evaluation of the current state of the law

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# Contents

<b>1</b>	<b>INTRODUCTION</b>	<b>3</b>
<b>1.1</b>	<b>TOPIC AND PROBLEM</b>	<b>3</b>
<b>1.2</b>	<b>SOURCES OF LAW</b>	<b>4</b>
1.2.1	TREATIES	5
1.2.2	CUSTOM	5
1.2.3	GENERAL PRINCIPLES OF LAW	6
1.2.4	JUDICIAL DECISIONS	6
1.2.5	TEACHINGS	7
<b>2</b>	<b>HISTORICAL OUTLINE</b>	<b>7</b>
<b>2.1</b>	<b>INTRODUCTION</b>	<b>7</b>
<b>2.2</b>	<b>THE JUST WAR PERIOD (C330 BC- AD 1650)</b>	<b>7</b>
2.2.1	THE CLASSICAL PHASE (C330 BC – AD 300)	8
2.2.2	THE CHRISTIAN PHASE (C300-1550)	8
2.2.3	THE SECULAR PHASE (C1550 -1700)	9
<b>2.3</b>	<b>THE POSITIVIST PERIOD (C1700 - 1919)</b>	<b>10</b>
<b>2.4</b>	<b>THE HAGUE CONVENTION</b>	<b>11</b>
<b>2.5</b>	<b>THE LEAGUE OF NATIONS</b>	<b>12</b>
<b>2.6</b>	<b>THE KELLOGG-BRIAND PACT</b>	<b>16</b>
<b>2.7</b>	<b>THE 1933 CONVENTION FOR THE DEFINITION OF AGGRESSION</b>	<b>17</b>
<b>2.8</b>	<b>THE NUREMBERG CHARTER AND JUDGMENT</b>	<b>18</b>
2.8.1	ESTABLISHMENT	18
2.8.2	JURISDICTION	19
2.8.3	THE REQUIREMENTS FOR INDIVIDUAL CRIMINAL RESPONSIBILITY	21
2.8.4	CRITICISM OF THE TRIBUNALS	22
<b>2.9</b>	<b>THE UNITED NATIONS CHARTER</b>	<b>23</b>
<b>2.10</b>	<b>THE ORGANS OF THE UNITED NATIONS</b>	<b>24</b>
2.10.1	THE SECURITY COUNCIL	24
2.10.2	THE GENERAL ASSEMBLY	27
2.10.3	THE PRACTICE OF THE GENERAL ASSEMBLY	28

2.10.4	THE GENERAL ASSEMBLY DEFINITION OF AGGRESSION	30
2.10.5	THE PRACTICE OF THE SECURITY COUNCIL	34
2.10.6	THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE	36
<b>2.11</b>	<b>THE INTERNATIONAL LAW COMMISSION DRAFT CODE</b>	<b>38</b>
<b>2.12</b>	<b>THE INTERNATIONAL CRIMINAL COURT</b>	<b>40</b>
<b>3</b>	<b>THE CURRENT STATE OF THE LAW</b>	<b>44</b>
<b>3.1</b>	<b>INTRODUCTION AND PROBLEM</b>	<b>44</b>
<b>3.2</b>	<b>THE CONTEMPORARY PROHIBITION OF THE USE OF INTER-STATE FORCE</b>	<b>46</b>
3.2.1	TREATY LAW	46
3.2.2	CUSTOMARY INTERNATIONAL LAW	46
3.2.3	JUS COGENS	47
3.2.4	THE INTERNATIONAL CRIMINAL COURT	47
<b>3.3</b>	<b>DEFINITION OF THE CRIME OF AGGRESSION</b>	<b>47</b>
3.3.1	THE OBJECTIVE DETERMINATION OF AGGRESSION	49
<b>3.4</b>	<b>THE PERSONAL COMPETENCE TO DETERMINE THE EXISTENCE OF AGGRESSION</b>	<b>50</b>
<b>3.5</b>	<b>THE PREPARATORY COMMISSION WORKING GROUP</b>	<b>52</b>
<b>3.6</b>	<b>CONCLUSIONS</b>	<b>55</b>
3.6.1	THE DEFINITION OF AGGRESSION	55
3.6.2	THE PERSONAL COMPETENCE TO DETERMINE THE EXISTENCE OF AGGRESSION	57
3.6.3	INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CRIMES OF AGGRESSION	58
<b>4</b>	<b>LITERATURE</b>	<b>61</b>
<b>4.1</b>	<b>BOOKS</b>	<b>61</b>
<b>4.2</b>	<b>ARTICLES</b>	<b>61</b>
<b>4.3</b>	<b>UNITED NATIONS DOCUMENTS</b>	<b>62</b>
<b>4.4</b>	<b>PREPARATORY WORK</b>	<b>62</b>
<b>4.5</b>	<b>CONVENTIONS</b>	<b>63</b>

# 1 Introduction

## 1.1 Topic and problem

The traditional rule is that states are the principal subjects of international law. Legal personality may be defined as the capability to bear rights and duties in international law. As a main rule individuals are objects of international law, and thus not capable of bearing rights or duties. However, this has changed somewhat during the last century. Individuals now enjoy some rights in international law. This development has been termed human rights law.

Individuals may also bear duties under international law. These duties may be divided in two categories: *Jus ad bellum* (the law of war), and *jus in bello* (the law during war). *Jus ad bellum* refers to the conditions under which one may resort to war or to force in general, while *jus in bello* governs the conduct of belligerents during a war, such as the prohibition of committing genocide, war crimes and crimes against humanity. The topic of this thesis is the *jus ad bellum*, and thus the *jus in bello* will not be discussed any further.

More specifically, the problem that will be analyzed in this thesis is whether an individual, acting as an agent of a state, illegally using force against another state, can be subject to criminal responsibility for committing a crime of aggression. In order to determine the current state of the law concerning the use of force and individual criminal responsibility, it is necessary first to review the historical background. This thesis is therefore divided into two parts. The first part consists of a historical outline of the regulations on the use of force, starting as far back as the Antiquity. Prior to this period, there were no regulations on resorting to the use of force. States had the right to use force, while individuals did not play any role in the international law.

The developments through centuries have led to the prohibition for states to resort to force. This is now stated in article 2(4) of the Charter of the United Nations. It states that the use of force or the threat of the use of force is illegal for states. However, the UN Charter deals with states only.

The Nuremberg and Tokyo tribunals brought with them important changes of the law relating to the use of force, namely that individuals are punishable under international law for committing crimes of aggression, even though they act on behalf of states. An important part of this thesis is to describe the historical background leading up to this change in the law.

The second part of this thesis is an analysis of the current state of the law relating to individual criminal responsibility for acts of aggression. This will in particular be related to the recent developments with the adoption of the statute of the International Criminal Court (ICC). The ICC can convict individuals for some of the most serious international crimes. War crimes, crimes against humanity, and genocide are all included and defined as crimes within the Court's jurisdiction.

The crime of aggression is also included; however, it is not defined in the statute. No agreement was reached concerning a definition of aggression, nor the personal competence to determine the existence of aggression, when the ICC statute was adopted at the 1998 Rome conference. It is therefore unclear whether there presently exists criminal responsibility for individuals who commit crimes of aggression.

## 1.2 Sources of law

The traditional sources of international law are listed in article 38 of the statute of the International Court of Justice (ICJ). Technically, this is only a list of the relevant sources of law for the ICJ. However, these sources have been widely accepted as the authoritative sources of international law. Three principal sources are listed in article 38: Treaties, custom, and general principles of law. In addition to these three, two sources are listed as subsidiary: Judicial decisions and teachings. These are subsidiary means, and thus not independent sources of international law.

All of the above listed sources have been made use of in the developments of the law on the use of force. Thus, they are all relevant sources of law, and will be employed in this thesis.

### 1.2.1 Treaties

Treaties (or conventions) are written agreements between states. They can either be entered into between two states; bilateral treaties, or more; multilateral treaties. Treaties represent one of the most basic and clear ways in which states create rules to regulate their behavior, and are somewhat similar to contracts under domestic law. Treaties normally become law in a process involving several steps. First, the parties enter into negotiations to determine what provisions they would like to include in the treaty. After they reach an agreement, the parties sign the treaty. Later it is submitted to national ratification in each state.

Most multilateral treaties need a specific number of ratifications in order to enter into force. This was the case with the statute of the ICC. This needed 60 ratifications to enter into force. Because of this, it took four years from the statute was adopted in 1998 until it entered into force.

Treaties are an important source of law for this thesis. Ever since the positivist period (see section 2.3), states have used treaties to regulate the relationship between them. There have been several attempts to regulate the use of force through multilateral treaties; such as the Covenant of the League of Nations (see section 2.5), and the Charter of the United Nations (see section 2.9).

### 1.2.2 Custom

Another principal source of international law is custom. The statute of the International Court of Justice (ICJ) in article 38 refers to it as “*evidence of a general practice accepted as law*”. Custom is created not by a written instrument, but rather by state behavior. State practice alone is not enough to create customary international law, the states must also engage in this practice because they believe that it is required by law. This requirement is also termed *opinio juris*. If, over a period of time, states begin to act in a certain way and view that behavior as being required by law, a norm of customary international law has been established.

The Nuremberg Principles (see section 2.8) have been accepted in the practice of states as a part of positive law since 1946, and they now represent customary law. The Principles have also been affirmed by the UN General Assembly. It has been debated whether the United Nations can create customary law. The UN is not a state, but rather an organization of states. However, the General Assembly consists of almost every state in the world. Thus, it may be argued that General Assembly resolutions are formulations of state practice, and that customary law can be developed by the Assembly. Against this it can be argued that General Assembly resolutions are only soft law, as they are political declarations, and not legally binding decisions.

### 1.2.3 General principles of law

This source of law is more controversial and difficult to grasp than the other two sources. It is not accepted by all legal scholars. For those who accept it as an independent source of international law, there seem to be at least three different definitions of the term. It may refer to either (i) general principles of most domestic legal systems, (ii) general principles about the nature of international law that states have to come to accept, or (iii) principles of higher law, such as equity or humanity.

The principle of legality is a principle of most domestic legal systems. Therefore, it may be argued that this is a general principle of law. This means that individuals should not be convicted for crimes of aggression without a pre-existing clear definition of the crime. This was argued by the defendants at Nuremberg, although it was ultimately rejected by the Tribunal (see section 2.8.4).

### 1.2.4 Judicial decisions

The ICJ has played an active role in the developments of the law on the use of force. An important case concerning the use of force was the *Nicaragua* case<sup>1</sup>. This case will be discussed later in the thesis, see section 2.10.6.

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<sup>1</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua ICJ Reports (1986)

### 1.2.5 Teachings

Teachings were the dominating source of law during the just war period (see section 2.2). The positivist period brought with it significant changes. As states started to regard themselves as sovereign, treaties became a more important source of law than teachings.

The International Law Commission (ILC) is a UN organ composed of lawyers elected by the UN General Assembly. The ILC has created a Code of Crimes to be used by the ICC (see section 2.11), and also wrote the draft statute of the ICC (see section 2.12).

The statements and recommendations made by the ILC may be considered as teachings. However, their status has been debated. The weight and relevance of this source of law is also somewhat unclear.

## 2 Historical outline

### 2.1 Introduction

The first regulations of the legality of aggression were done in ancient Greece and Rome. Interstate arbitration was used in the Greek world, and arrangements very like modern security pacts and non-aggression treaties were made. The Roman approach was in terms of formal legality.

### 2.2 The just war period (c330 BC- AD 1650)

The distinction between just war and unjust war, *bellum justum* and *bellum injustum*, can be traced back to the Roman Empire, from the days of the kings until the late republican era. In reviewing the developments of the just war period, three phases can be identified: The classical phase, the Christian phase, and the secular phase.



### 2.2.1 The classical phase (c330 BC – AD 300)

One of the first writers to develop a just war doctrine was the classical Greek philosopher Aristotle. For Aristotle, war was not to be deemed an end in itself, but only a means of establishing the good life for the citizens of a community. Aristotle saw three reasons that could make a war just. The first reason was self-defense. The second was to establish a political rule over individuals who would benefit from it. The third was to enable men to make themselves masters over those who naturally deserved to be slaves.

Another classical thinker to adopt the just war approach was the Roman statesman and philosopher Cicero. For Cicero, as for Aristotle, the ultimate aim of war was to establish peace. Cicero argued that war could have two just causes: To redress an injury or to drive out an invader. In addition to a just cause, necessary procedural conditions had to be followed. No war was just unless preceded by an official demand for satisfaction or warning, and a formal declaration had been made.

### 2.2.2 The Christian phase (c300-1550)

The early Christian church refused to accept war as moral in any circumstances, and most Christians were pacifists. But this changed with the growing influence of Christianity in the Roman Empire. When Christians started to play an important role in the political life of the Empire, many began asking how it could function without the right to use force. Christian theology and Canon Law therefore came to support the just war doctrine.

The just war concept was elaborated and given authority in the Christian world by St. Augustine (354-430). St. Augustine did not develop a systematic doctrine, but he argued that war under certain circumstances could be just. For St. Augustine, war was a permissible part of the life of a nation, and the power of prosecuting a war was part of the natural powers of a monarch. St. Augustine expressed the fundamental principle that every war was a regrettable phenomenon, and that the only reason which justified war was the desire for peace.

The scholars in the Christian phase were more concerned with the morality than with the legality of war. However, if recourse to war was unjust, it would also be illegal. This was because the medieval Christian writers accepted a natural law approach. Thomas Aquinas (1225-74), the most influential theologian to follow St. Augustine, provided a systematic framework for the Christian just war doctrine. Natural law, according to Aquinas, was “*the rational creature’s participation of the eternal law*”. In other words, natural law was what a human being through reason could understand of God’s eternal law. Human law, which today might be called positive law, was only really *law* if it conformed to the natural law.

Aquinas argued that the recourse to war was permissible if it met three conditions. First, war had to be conducted under the proper authority, which would be that of a prince. Secondly, there had to be a just cause, a *causa justa* for the war. Those who were attacked should be attacked because they deserved it on account of some fault. Thirdly, it was necessary that the belligerents had the right intention, *intentio recta*. Those fighting a just war had to do it to achieve good or avoid evil.

Aquinas’ three conditions came to be widely accepted by Christian thinkers in the medieval period. One clarification that Francisco Vitoria and Francisco Suarez added to the doctrine was the idea of proportionality. Suarez explained that not every cause is sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would occasion. In other words, the injury suffered by the state must be roughly equivalent to the injuries to be suffered in war in order for it to justify recourse to war. The concept of proportionality was to play an important role later in the development of the *jus ad bellum*.

### 2.2.3 The secular phase (c1550 -1700)

Sixteenth and seventeenth century writers began to develop the *jus ad bellum* apart from supernatural concerns. An important writer of this period was Hugo Grotius (1583-1645). In his work *De Jure Belli ac Pacis* (on the law of war and peace) Grotius set forth his requirements for a just war. A first just cause for the use of force was defending persons and property. The danger faced by the nation had to be immediate,

the force used had to be necessary to adequately defend the nation's interests, and the use of force had to be proportionate to the threatened danger. Grotius allowed anticipatory self-defense, if the danger was immediate and imminent in point of time. A second just cause for initiating war was to punish a state that had caused an injury. Grotius argued that for a war to be permissible, it had to be declared by the state.

The just war approach may be criticized for being illogical. The thinkers of the just war period argued that the way to achieve peace was by starting a war, which is the opposite of peace. The just war doctrine was, not surprisingly, ineffective in preventing wars. In almost every armed conflict, justice was appealed to by all parties. They all relied on the justice of their disagreeing causes, and that they would be equally right. As the justification did not need to be superior to the claims of the enemy, the requirement of a just cause did not prevent the outbreak of wars. This brought the just war doctrine to an end.

### 2.3 The positivist period (c1700 - 1919)

The state system and the concept of sovereignty, among other things, were to diminish the importance of the just war doctrine. With the emergence of the state system, a new theoretical doctrine to explain the status of the state was developed - the doctrine of sovereignty. Associated with writers such as Jean Bodin and Thomas Hobbes, the doctrine came to be regarded as the fundamental ordering principle of the state system. Sovereignty meant three things: (i) The ruler of a state had sole authority over the territory, (ii) states were regarded to be legally equal to one another, and (iii) states were subject to no higher law without their consent.

The European states reached a general settlement in the treaties constituting the peace of Westphalia in 1648, which brought an end to the devastating 30 years war. This was a peace treaty between the Holy Roman Emperor and the King of France and their respective allies. The doctrine of sovereignty achieved codification with the adoption of this peace.

With the emergence of sovereignty as an ordering principle of the international system, legal scholars formulated the doctrine of positivism. Since states could be bound by no higher law, the only law that could exist was that which they created by their consent. This was done through treaties, customs, and general principles. Now that states were sovereign, they had a sovereign right to go to war. There was only one real qualification of the right to go to war that was accepted by states during this period, namely that war had to be declared. Hence, a state simply declared war, and it was lawful.

The Westphalian international system has served as the basis for the development of the modern anarchical international system as well as international law, including its fundamental principles such as sovereign equality of states and non-intervention in their internal affairs. The intention behind the doctrine of sovereignty was to create a system which would be stable and permanent, resting on a concept of a European public peace and public law. This legal order was to rest on the political status quo which was assumed to represent a balance of power between the various states or groups of states. The balance of power and the public law of Europe were to last until 1914, when the First World War broke out.

## 2.4 The Hague Convention

At the end of the 19<sup>th</sup> century the Czar of Russia, recognizing that he could not cope with the financial burden of an arms race against France and Germany, convened a Peace Conference of 26 states in The Hague. The two Hague Peace Conferences of 1899 and 1907 lead to the Hague Convention for Pacific Settlement of International Disputes. These were the first steps taken to limit somewhat the freedom of war in general international law through multilateral treaties.

In article 1 of the Hague Convention, the contract parties agreed to “*use their best efforts to insure the pacific settlement of international differences*”.

They further stated in article 2 that “*In case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.*”

The provisions that disputes should be settled by arbitration were neither compulsory nor enforceable, as none of the sovereign states were really prepared to surrender their independence to any third party or group. According to article 6 of the Convention, good offices and mediation “*have exclusively the character of advice and never have binding force.*” What emerged from the 1899 and 1907 conferences was not a plan to prevent war, but some rules relating to how states should fight a war, namely the *jus in bello*.

## 2.5 The League of Nations

The doctrine of sovereignty led to an anarchical international system. A situation of lawlessness developed among states, as states were bound by no law without their consent. In 1914, the problems of such an anarchical system became obvious when the First World War broke out. After the end of the war, the victorious nations assembled in the Palace of Versailles in the spring of 1919.

One of the foremost concerns at the Paris Peace Conference was to ensure that such a war should never occur again. To achieve this, the delegates sought to establish a new, global international organization. This was done by the creation of the League of Nations, which was an integral part of the peace settlement. There were 31 original signatories of the Covenant. US president Woodrow Wilson was awarded the Nobel Peace Prize in 1919 for his leadership in creating the League. Despite Wilson’s efforts, the US Congress refused to ratify the Treaty of Versailles.

The peace agreement also decided on international criminal responsibility for Kaiser Wilhelm II. He was accused of “*a supreme offence against international morality and the sanctity of treaties*”<sup>2</sup>. This was the first time in history that an individual was officially charged with the instigation of a war. The trial never took place, as the Kaiser sought refuge in the Netherlands. The Netherlands refused to extradite him on the basis that he enjoyed immunity from prosecution as he was head of state.

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2 Art. 227 of the Treaty of Versailles

In Article 10 of the Covenant, the members of the League pledged “*to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League*”. Article 11 stated that any war or threat of war against one of the countries in the League was a threat to the entire League.

The League restrictions dealt exclusively with recourse to *war*. No provisions were made to limit the use of force that would fall below the threshold of war. In consequence, even under the League Covenant, acts of aggression short of war would be regulated by the same regime that existed during the positivist period.

The League Covenant did not entirely abolish the right of states to resort to war. Subject to specific prohibitions, war remained lawful, and substantial rights to take recourse to force were left open. This was stated in article 12, where the signatories pledged to submit any dispute “*likely to lead to a rupture*” to arbitration, judicial settlement, or to enquiry by the League Council.

If no decision was made regarding the issue, there would be no obligation to refrain from the use of force. If on the other hand a decision was made, states would be obliged to refrain from going to war against a state complying with the decision of the settlement body. If, however, one party did not comply with the decision, the other party could take recourse to war after waiting three months.

In 1924 a protocol known as the Geneva Protocol went further than the League Covenant in limiting the right to go to war. It only left the right open in two circumstances. The first circumstance was defense from aggression, the second when war was authorized by a competent organ of the League. However, the protocol failed to receive the necessary number of ratifications to enter into force.

The League Covenant was widely supported. However, the US refusal to sign the treaty caused smaller states to turn to treaties of mutual assistance, hoping that these might be a more effective deterrent to war. It soon became obvious that if several states were to join together to repel aggression, it would be necessary to have some understanding

about how the aggressor was to be identified. The Council of the League and various committees tried to find what precise criteria could help to determine which of the conflicting parties was the aggressor. Economic and industrial mobilization, propaganda, troop movements, large-scale attacks, the crossing of frontiers, failure to accept a cease-fire, or refusal to submit a dispute to a judicial body for binding determination, were all considered as possible indicators of aggression.

This would then justify retaliation by the victim and its supporters by means of economic, financial, and military sanctions. The studies and draft treaties of non-aggression might have had some chance if the sovereign powers were really willing to accept the obligations which they entailed. However, this was clearly not the case.

The 1920's had been a period of prosperity and democracy, when the League had been quite successful. But after 1930 and the great depression, countries tried to increase their wealth at the expense of other nations. Fascist governments came to power in Germany and Italy. In the 1930's, the League failed terribly. The failures of the League were caused by the non-support from major powers, the United States' refusal to join, lack of interest in remote conflicts, collusions, and problems with defining aggression.

The League was in fact more a defensive alliance of the victorious states from the First World War than an effective plan to avoid the recurrence of new international conflicts. The League's plans to bring armaments under international control and to apply effective sanctions against an aggressor failed completely. Those who believed they had power were not willing to surrender it. Three cases where the League failed in the 1930's were the Manchuria war, the Chaco war, and the Italian conquest of Ethiopia.

In September 1931 the Japanese claimed that Chinese soldiers had sabotaged the Manchurian railway, and therefore attacked the Chinese army. By February 1932, Japan had conquered the whole of Manchuria. Thousands of Chinese soldiers and civilians were killed. China appealed to the League of Nations. The League sent a delegation to Manchuria. When the delegation reported back a year later, it concluded that the Japanese were completely in the wrong and that Manchuria should be returned to China. In March 1932 Japan invaded China. The League suggested economic sanctions, but

nothing was done. The League did not even stop arms sales, because it feared that this would cause Japan to declare war. At a special assembly of the League in February 1933, 40 nations voted that Japan should withdraw from Manchuria. Only Japan voted against. But instead of withdrawing from Manchuria, Japan withdrew from the League.

The Chaco war, lasting from 1932 to 1935, was the result of a territorial dispute over the Chaco Boreal between Bolivia and Paraguay. An undeclared border war had been going on at the Gran Chaco between the two countries since December 1928 over rich oil deposits. Paraguay appealed to the League of Nations, but the approach was rejected by Bolivia, and the League yielded to regional mediation.

When the Washington Commission of Neutrals failed in 1933, Bolivia appealed to the League, which sent a Commission of Inquiry. An arms embargo was recommended, and 28 nations agreed to this in May 1934. The arms embargo was lifted from Bolivia after they accepted the cease-fire proposal. Paraguay did not accept the proposal, and resigned from the League in February 1935. In May that year, the League gave the Gran Chaco dispute back to a South American mediation conference.

In the 1930's, the Italian dictator Mussolini decided to build an Italian empire. In 1934, he got ready to invade Abyssinia (now Ethiopia). Haile Selassie, the emperor of Ethiopia, asked the League for assistance. In July that year, the League banned arms sales to either side. This hurt Ethiopia much more than the Italians, who were ready to attack. The League suggested a plan to give part of Ethiopia to Italy. Mussolini ignored the League. Britain and France, wanting to keep a friendly relation with Italy, secretly agreed to give Ethiopia to Italy. Italy conquered Ethiopia in May 1936.

At this point, most countries did not think that the League could keep the peace. When Hitler began to break the Treaty of Versailles, the League was powerless to stop him. The League had failed, and the only way to stop Hitler was a second world war.



## 2.6 The Kellogg-Briand Pact

The Covenant of the League of Nations was a significant landmark in the development of legal texts on the use of force in international relations. However, the Covenant contained significant gaps. Subsequent efforts were made to fill these. The most important effort was the General Treaty for Renunciation of War as an Instrument of National Policy (the Kellogg-Briand Pact), signed in Paris in 1928. The parties to this treaty included both the United States and the Soviet Union.

In article 1 of the Pact, the signatories declared that they

*“condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another”.*

The signatories further agreed in article 2

*“that the settlement or solution of all disputes or conflicts of whatever origin they may be, which may arise among them, shall never be sought except by peaceful means”.*

Hence, unlike the League Covenant, which permitted the recourse to war in certain circumstances, the Kellogg-Briand Pact outlawed the resort to war entirely.

Like the Geneva Protocol, the Kellogg-Briand Pact drew a legal distinction between aggression on one hand, and self-defense and force authorized by a universal international organization on the other. But unlike the Geneva Protocol, the Kellogg-Briand Pact entered into force and was widely regarded by states as authoritative.

With the Kellogg-Briand Pact, international law progressed from *jus ad bellum* to *jus contra bellum*. War remained lawful under the following circumstances: (i) Self-defense. Formal notes reserving the right of self-defense were exchanged between the principal signatories prior to the conclusion of the Pact. (ii) War as an instrument of international policy. War remained legal under the support of the League of Nations. (iii) War outside the span of the reciprocal relations of the contracting parties. The

freedom of war was preserved between contracting and non-contracting parties, and among non-contracting parties.

The Pact only explicitly outlawed *war*. It is not clear whether it also imposed any restrictions on the use of force short of war. It has been argued that it only outlawed war. The opposite is suggested by Ian Brownlie, who finds it understood that the Pact prohibits “*any substantial use of armed force*”.<sup>3</sup>

But once again, the regime that existed in the pre-League period dealing with uses of force short of war continued to apply. Also, the interpretation of permissible self-defense remained unclear. Every state was left free to decide for itself whenever its vital interests were threatened, and then it would be legitimate to resort to war as part of what was conceived to be an inherent right of self-defense.

The Kellogg-Briand Pact was quite significant in the development of the law relating to the recourse to force. But ultimately, it did little to restrain the aggressive powers that started the Second World War. However, the idea of prohibiting aggressive war had been planted in the minds of modern world leaders. This idea would surface again after the war in the form of article 2(4) of the Charter of the United Nations.

## 2.7 The 1933 Convention for the Definition of Aggression

A multilateral convention for the definition of aggression was signed in London on July 3, 1933 by Romania, Estonia, Latvia, Poland, Turkey, the Soviet Union, Persia, and Afghanistan. These states deemed it necessary, in the interest of general security, to define aggression as specifically as possible, in order to “*obviate any pretext whereby it might be justified*”.

Aggression, as defined in article 2 of the statute, means a declaration of war, invasion by armed forces, attack by land, naval or air forces, naval blockade of coasts or ports, or

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<sup>3</sup> *International Law and the Use of Force by States*, first edition, Oxford, 1963

support to armed bands formed in its territory which have invaded the territory of another state. The definition made no reference to the term *war*, which was itself ambiguous, but simply outlawed the *resort to force*. The essential fact needed to identify the aggressor objectively was to ascertain which party had been the first to use armed force.

At the 1933 Disarmament Conference in Geneva, Mr. Maxim Litvinoff, Soviet commissary for foreign affairs, submitted the definition of aggression for consideration. A committee of 17 nations praised the Soviet initiative, studied the definition carefully, and adopted most of its terms.

However, as the League of Nations began to crumble in the second half of the 1930's, all attempts to define aggression and to set up an effective international system of security came to an end. States returned once more to the system of international anarchy.

## 2.8 The Nuremberg Charter and Judgment

### 2.8.1 Establishment

The Charter of the Nuremberg Tribunal was established by an agreement signed in London on August 8, 1945. The Nuremberg Charter was annexed to the London Agreement and formed an integral part of this. Its purpose was to try the major war criminals of the European Axis, whose crimes had mainly taken place on the European continent and in the Soviet Union. The Charter was established by the four big powers – the United States, the USSR, the United Kingdom, and France. It was later adhered to by 19 additional allied nations.

The Nuremberg Tribunal stated that

*“to initiate a war of aggression ... is not only an international crime; it is the supreme international crime differing from other war crimes in that it contains within itself the accumulated evil of the whole”.*

The constituent instruments contained relatively brief definitions of crimes against the peace. They defined crimes against the peace with reference to wars of aggression or wars in violation of international agreements.

The Tokyo Tribunal was established on January 19, 1946, for the purpose of trying the major war criminals in the Far East, whose offences included crimes against the peace. The Tribunal upheld the Nuremberg criminalization of aggressive war. In addition to the Nuremberg and Tokyo tribunals, other German and Japanese criminals were convicted by the allied nations' national courts in the occupied areas. In Germany this was done by the Allied Control Council Law No. 10, where over 20.000 war criminals were convicted. In the Far East, war criminals were convicted by so-called Allied National War Crimes Trials.

## 2.8.2 Jurisdiction

The jurisdiction of the Nuremberg Tribunal was set forth in the Nuremberg Charter. The Tribunal's article 6 stated the important principle that individuals can be made criminally responsible for violations of international law. The Charter in article 6 a - c included three categories of offenses which could be punished by the Tribunal. The first was crimes against peace, namely

*“planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”*

The two other categories of crimes were war crimes and crimes against humanity.

Article 6 further stated that

*“Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”*

This was the first time that the concept of crimes against the peace was introduced. The indictment set out the developments in international law which had established the illegality of aggressive war, in particular the Geneva Protocol and the Kellogg-Briand Pact. The Nuremberg Tribunal described the Nuremberg Charter as an expression of existing international law rather than an arbitrary exercise of power by the allied states. The Tribunal found that Germany had violated a number of provisions of the Treaty of Versailles, and that all of the aggressive wars violated the Kellogg-Briand Pact. It concluded that war as an instrument of national policy was already a crime based on the Kellogg-Briand Pact.

The tribunals, in order to determine the lawful or unlawful character of the wars, first considered whether the wars were defensive or aggressive in character. They considered it unnecessary to decide whether the wars violated international agreements after finding that they constituted the even greater crime of aggressive war. Germany's illegal acts were spelled out in detail. However, neither the Nuremberg Judgment nor the Charter on which it was based defined aggression. It was however agreed that the unprovoked assault and invasion of peaceful neighboring states was a crime against the peace for which the responsible leaders would be held to culpable account.

The jurisprudence of the tribunals clarifies and further addresses a number of important issues relating to the two aspects of aggression, which are the conduct by a state that constitutes aggression, and the essential elements required for an individual to be held responsible for crimes against the peace. The Nuremberg Tribunal stated that

*“individuals have international duties which transcend the national obligations of obedience imposed by individual states”.*

*"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.*

The Nuremberg Tribunal found three of the indicted persons not guilty, and 19 were found guilty. Of the 19 convicted persons, 12 were given the death penalty, three were given life sentences, and four were given time limited sentences.

### 2.8.3 The requirements for individual criminal responsibility

The requirements for international criminal responsibility were set out in the Nuremberg Charter and the different tribunals. Control Council Law no. 10 was the only constituent instrument that addressed the question of a high-level position as a prerequisite for individual responsibility for crimes against peace. It provided that a person had to hold a high political, civil or military, financial, industrial or economic position in Germany or one of its allies in order to be punished. Even though the constituent instruments of the other tribunals did not contain such a provision, it was generally recognized that persons holding a high-level position were the only ones who were able to commit crimes against the peace.

The jurisprudence of the tribunals indicates that it is not the person's title, rank or position that decides whether he can be tried, but rather the ability to exercise the power that accompanies a high-level position. This would be leadership, policy-making, decision-making, influencing high-level officials, as well as responsibility and authority. The tribunals considered both whether the person held such a position, and whether he used his powers to further or to impede the aggressive aims.

The question of knowledge was not addressed in the constituent instruments of the tribunals. However, the tribunals considered knowledge to be an essential element of individual responsibility for crimes against the peace. The tribunals stated that the better the knowledge was, the stronger the criminal intent became. The type of knowledge required depended on the stage at which an individual participated in the aggressive war. This included knowledge of the aggressive plans, the aggressive purpose of the preparations, and the aggressive character of the war. In some cases, the tribunals also considered the necessity of actual knowledge, and the existence of common knowledge.

The constituent instruments of the tribunals rejected superior orders and official position as valid defenses for crimes against the peace, to prevent the defendants from using this as excuses or reasons for impunity for their actions. The fact that a defendant acted under orders from a superior did not absolve him of responsibility, although it could reduce the punishment.

In some instances, the tribunals also considered the questions of intent, motive or purpose, but this was not included in the definition in the constituent instruments.

#### 2.8.4 Criticism of the tribunals

The trials have been criticized for a variety of reasons. One of the main reasons is that only the defeated Germans and Japanese were held accountable for their war crimes and crimes of aggression. In the words of Justice Radhabinod Pal of India, dissenting at the Tokyo Tribunal, that was “*victor’s justice*”. United States leaders who were responsible for at least two of the most heinous war crimes in the history of the world – the atomic bombings of Hiroshima and Nagasaki – were never brought before a tribunal. These bombings mostly killed civilians, and it has been argued that they were demonstrations of power rather than necessary for the United States in order to win the war.

The list of those accused has been criticized for being somewhat arbitrary. Historians do not doubt that the allies were selective in their prosecution of war crimes, and that their vested interests sometimes determined their decision not to prosecute certain crimes. The accused had been charged with violations of international law, but such law was binding on nations, not individuals. Individuals, it was argued, could only be brought to justice under the laws of their own country, not on the basis of a new order established after the war. The tribunals’ certitude that the illegality of war under the Kellogg-Briand Pact automatically lead to its criminality has also been criticized.

The accused Nazi war criminals called upon the *nullum crimen nulla poena sine lege* norm at Nuremberg, particularly with respect to charges of crimes against the peace. They claimed that there could be no punishment of crime without a pre-existing law. The Tribunal rejected the plea because “*in such circumstances the attacker must know*

*that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished... ”.*

The Tribunal noted that the defendants must have known from the existing treaties and international agreements and declarations that aggression was a criminal act. Justice Robert M. Jackson, America’s Chief Prosecutor at Nuremberg argued that the actions of the Nazi leaders were unambiguously aggressive when considered in the light of the 1933 convention on that subject.

The proceedings were open to the public, all defendants could choose their own counsel and receive the usual benefits of fair trial. Further, there was probably no alternative way of punishing the individuals who were responsible for causing the war. This was deemed as important and necessary to prevent such a war from taking place again. The fairness of the trials following the Second World War has been widely acknowledged.

## 2.9 The United Nations Charter

In 1945, the Charter of the United Nations was adopted in the aftermath of the Second World War. The Charter sought to create legal norms to regulate the behavior of states, especially with respect to the use of force. It rejected the concept of the use of force as a means for settling disputes. One of the aims of the Charter was to redress the shortcomings of the Kellogg-Briand Pact.

The first paragraph of the preamble of the Charter enunciates the determination *“to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”.*

Article 2(3) prescribes:

*“All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”.*



Article 2(4) restates and reinforces the customary norm that forbids the use of force by states. It also forbids the threat of the use of force. Article 2(4) states that

*“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.*

Articles 2(4) and 2(3) must be read together. The correct interpretation of article 2(4) is that any use of inter-state force by member states for whatever reason is banned, whether amounting to war or not, unless explicitly allowed by the UN Charter. This article forbids the use of force by United Nations members against any state, not only other member states. Exceptions to this rule must be looked for not within article 2(4), but in other clauses of the Charter. This prohibition against aggression is not a matter of criminal law, but a fundamental norm of international law binding on all states.

The only two exceptions to article 2(4) that still have major significance, are enforcement actions authorized by the Security Council (article 42), and individual and collective self-defense (article 51). These norms are generally regarded as rules of international law from the perspective of both treaty law and customary law.

Article 2(4) has raised many questions concerning its interpretation. First, concerning what exactly is a *“threat or use of force”*. It can be understood as purely military force or armed force, but also something broader, like diplomatic or economic measures. The second question deals with what is a use of force against the *“territorial integrity”* or *“political independence”*, or force that is *“inconsistent with the Purposes of the United Nations”*.

## 2.10 The organs of the United Nations

### 2.10.1 The Security Council

The Security Council has primary responsibility for the maintenance of international peace and security under article 24 of the Charter of the United Nations. Article 24(1)

states that

*“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”.*

The Security Council has the power to take decisions binding on member states under article 25, which states that *“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”*

Chapter VII of the Charter deals with the Security Council’s powers related to threats to the peace, breaches of the peace, and acts of aggression. Article 39 states that *“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression...”*.

Article 41 gives the Security Council the right to decide what measures not involving the use of armed force are to be employed to give effect to its decisions. It may also call upon the members of the United Nations to apply those measures. When one of the alternatives in article 39 is determined, and the Council considers that the measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may under article 42 order member states to use force against the violating state;

*“...it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”.*

The limited capacity of the Security Council to respond to identified threats to the peace and security is also met in part by the UN Charter’s explicit protection of the right of self-defense in article 51:

*“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”*

This states two express conditions for military action in self-defense. The first condition is the existence of an armed attack against the state. The second condition is the absence of Security Council intervention; the Council must not have taken measures to restore international peace and security. Article 51 further states that members taking military action in self-defense are required to report it immediately to the Security Council.

Self-defense may be exercised either individually or collectively. Collective self-defense means that the victim state may receive the assistance of other states to help ward off the attacker. It has been debated how collective self-defense should be exercised, such as whether a state can come to the aid of another without the request of the victim state.

Problems of interpretation have surfaced also with respect to article 51. Self-defense has been the most frequently used and abused excuse to justify the unilateral or collective application of armed force. The English version reads *“inherent right”*, while the French version reads *“droit naturel”*. However, the article is merely a reference to customary law that existed before the adoption of the UN Charter. This means that the Charter does not give the states a wider right to use self-defense than what existed before the Charter was adopted.

Further, it is unclear what constitutes an *“armed attack”*, and if this is different from an *“act of aggression”*, which is mentioned in article 39 of the Charter. The French version reads *“aggression armée”*, which might be given a wider interpretation than *“armed attack”*. However, the purpose of self-defense has to be to stop an armed attack, not, for instance, a regime change. It also follows implicitly that a defensive action must be reasonably immediate for it to be legal self-defense.

It has also been debated whether an armed attack is the only circumstance giving rise to self-defense. Article 51 does not address the possible need for the unilateral use of force at an earlier stage than after an armed attack has occurred. The United States insists on preemptive actions as just self-defense. This is probably inconsistent with the Charter. If the use of force comes before an armed attack, it is anticipatory self-defense, which is not really self-defense at all. However, if one knows that an armed attack is on its way, uses of force in order to stop this attack will be allowed. When it comes to humanitarian intervention, the general opinion is that without a prior Security Council resolution, this is a violation of the UN Charter.

### 2.10.2 The General Assembly

The General Assembly, in accordance with Article 11 of the UN Charter, may discuss any question relating to the maintenance of international peace and security brought before it by a member state, the Security Council, or a non-member state. The General Assembly is precluded from making any recommendations regarding a dispute or situation in respect of which the Security Council is exercising its functions assigned by the Charter, unless so requested by the Security Council under article 12.

The General Assembly must refer any such questions requiring action to the Security Council either before or after discussion. The General Assembly may further recommend measures for the peaceful adjustment of any situation likely to impair the general welfare or friendly relations among States in accordance with article 14, except as provided in article 12.

It has been debated whether the Security Council has the final say not only as to what is an act of aggression, threat to the peace or breach of the peace under chapter VII of the UN Charter, but also as to what is a threat or use of force under article 2(4), and as to whether a state is acting in self-defense under article 51. However, the resolutions and statements of the Security Council and the General Assembly tend not to use the language of the Charter in articles 2(4) and 51, nor to refer to them expressly; when they do refer to these articles it is normally to recall them in general terms in the preamble of a resolution. But at times western powers have challenged the right of the General

Assembly to use terms such as aggression, contained in chapter VII of the UN Charter, on the ground that the General Assembly should not override the discretion of the Security Council.

### 2.10.3 The practice of the General Assembly

As early as in 1946, the General Assembly affirmed the principles of international law recognized by the Charter and the Judgment of the Nuremberg Tribunal. Its definition of crimes against the peace has been accepted in the practice of states as a part of positive law since 1946. In 1947, the General Assembly instructed the International Law Commission (ILC) to formulate the Nuremberg Principles and to prepare a Draft Code of Offences against the Peace and Security of Mankind, based upon those principles. The purpose was to establish an international criminal court to convict individuals in violation of such crimes.

The ILC enunciated the Nuremberg Principles in 1950, and recited the Nuremberg Charter's definition of crimes against the peace, emphasizing that offenders bear responsibility for such crimes and are liable to punishment. It appears that it was the criticism of the Second World War tribunals that led to the attempts at defining aggression. The General Assembly condemned aggression as "*the gravest of all crimes against peace and security throughout the world*".<sup>4</sup>

The first phase of the International Law Commission's work on the draft Code was completed in 1954. The Commission there defined any act of aggression as an offence against the peace and security of mankind. Article 1 laid down that the offences listed "*are crimes under international law, for which the responsible individuals shall be punished*". The General Assembly decided that the draft Code as formulated by the Commission raised problems concerning the definition of aggression.

The Assembly therefore gave a special committee the task of preparing a report on a draft definition of aggression. It was argued that without a clear definition of the crime

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<sup>4</sup> General Assembly Resolution 380 (V)

of aggression, no criminal code would be complete, and as long as there was no code, there was no need for a court to enforce it. A serious examination of the 1954 draft Code was therefore suspended until a definition of aggression could be agreed upon. For two decades, the draft Code remained dormant.

The inaction of the Security Council and its failure to play the role provided in the UN Charter during the Cold War, led the General Assembly to assume a greater role than originally envisaged. Article 11(3) of the UN Charter gives the General Assembly the right to call the attention of the Security Council to situations which are likely to endanger international peace and security. In 1950 the Assembly by an almost unanimous vote adopted the *Uniting for Peace*<sup>5</sup> resolution, in connection with the Korea crisis.

The United States played an important role in the adoption of this resolution, concerned about the possibilities of vetoes by the Soviet Union during the Cold War. The resolution allowed the General Assembly to call emergency meetings in the event of the Security Council's failure to exercise its primary responsibility for the maintenance of peace and security. The resolution states that

*“If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures. These recommendations can include in the case of a breach of the peace or act of aggression the use of armed force when necessary to maintain or restore international peace and security”.*

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<sup>5</sup> General Assembly Resolution 377 (V)

*Uniting for Peace* can be invoked either by nine members of the Security Council or by a majority of the members of the General Assembly. The Uniting for Peace procedure has been used ten times since 1950.

*The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*<sup>6</sup> was adopted by the General Assembly on December 21, 1965. Its paragraph 1 declared that “*No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state*”.

Paragraph 2 forbids the use of economic, political or any other measures to prevent a state from exercising its sovereign rights. Paragraph 3 states that the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention. Paragraph 5 gives every state an inalienable right to choose its political, economic, social and cultural systems.

Paragraphs 1, 2, 3, and 5 of this resolution were incorporated into the 1970 *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States*<sup>7</sup>. In accordance with the Charter of the United Nations, this proclaimed that a “*war of aggression constitutes a crime against peace, for which there is responsibility under international law*”. Paragraph 6 expressly prohibits armed reprisals. In the *Nicaragua case*<sup>8</sup>, both of these declarations were regarded as stating the customary international law on intervention.

#### 2.10.4 The General Assembly definition of aggression

The UN Special Committee reached a definition on the meaning of aggression in 1974. On the basis of the recommendations of the Committee, the General Assembly on

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6 General Assembly resolution no. 2131 (XX)

7 General Assembly resolution no. 2625 (XXV)

8 Case Concerning Military and Paramilitary Activities in and against Nicaragua ICJ Reports (1986)

December 14, 1974, adopted the definition without putting it to a vote<sup>9</sup>. Principles of international law that had been accepted in the ambiguous 1970 *Declaration on Friendly Relations* were also reaffirmed. The General Assembly considered that aggression was the most serious and dangerous form of the illegal use of force.

The resolution contains elements of both a general and an enumerative definition. Article 1 provides a general definition. It defines aggression as

*“the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”*

This follows the pattern of article 2(4) of the UN Charter. Despite doubts of a number of states, this definition does not include economic aggression. Unlike the UN Charter article 2(4), it does not include the threat of armed force.

Article 2 states that *“The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression...”*. However, the Security Council may conclude otherwise *“in the light of other relevant circumstances”*. There were several different interpretations of the meaning of this article. Some states held that the use of armed force was aggression until the Security Council stated otherwise. Others could not understand how the application of force in contravention of the Charter could fail to be aggression. Other states argued that there could be no determination of aggression until there was a specific finding by the Security Council.

The enumerative definition in article 3 provides a list of acts that qualify as acts of aggression. Invasion or attack, as listed in article 3(a) is the classical illustration of an act of aggression. This appeared, in slightly modified wording, in the 1933 definition of aggression.

The other acts listed in article 3 qualifying as aggression are:

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<sup>9</sup> General Assembly Resolution No. 3314 (XXIX)



- (b) Bombardment by the armed forces of a state against the territory of another state.
- (c) Blockade of ports or coasts of a state by the armed forces of another state.
- (d) Attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state.
- (e) The use of armed forces of one state which are within the territory of another state.
- (f) Allowing its territory to be used by another state for perpetrating an act of aggression against a third state.
- (g) The sending by or on behalf of a state of armed bands, groups etc. which carry out acts of armed force against another state.

The definition laid down in the resolution is not exhaustive, as stated in article 4, which adds that the Security Council may determine that other acts than those listed in articles 2 and 3 constitute aggression under the provisions of the Charter.

Article 5(1) states that no political, economic, military or other considerations may serve as a justification for aggression. This has its origins in the 1933 draft. Article 5(2) differentiates between aggression, which “*gives rise to international responsibility*”, and war of aggression, which is “*a crime against international peace*”. It seems that a war of aggression would result in individual criminal responsibility, while lesser forms of aggression only give rise to state responsibility of a civil kind.

The General Assembly recognized that a war of aggression was a crime against international peace, but no provision was made to hold accountable those responsible for the crime. Personal responsibility is not explicitly mentioned, although this had been one of the main objectives of the Nuremberg proceedings. Article 5 seemed to ignore the Nuremberg decisions that even a threat of aggression that causes capitulation without a fight is a crime against the peace.

According to article 6, the resolution shall be interpreted in a way that is consistent with the Charter of the United Nations. The purpose of this was to avoid having the attempt to define aggression turn into a debate on the definition of self-defense.

Article 7 states that nothing in the definition can prejudice the efforts of peoples under alien domination in their struggle for “*self-determination, freedom and independence*”, as long as such actions were “*in accordance with the principles of the Charter*”.

Despite the agreement on the formulation of the text, there was no agreement in fact about what means could lawfully be employed, what aid could be received, and against whom such aid and means could be employed if condemnation as an aggressor was to be avoided. Many western states concluded that unrestrained violence, no matter what the purpose, had not been authorized by this definition.

The concluding article 8 states that the definition forms an inseparable whole. This assured that the meaning of any one provision could only properly be understood in the light of the other articles of the definition.

The definition was a product of compromise. Consensus was reachable because of the definition’s ambiguity so that nations could interpret the text to serve their own political purposes. The diplomats charged with the responsibility for drafting the definition were bound by their official duties to consider above all else the interests of their own homeland.

The definition was drafted in order to serve as a guiding instrument for the Security Council in discharging its primary responsibility for the maintenance of international peace and security under chapter VII of the UN Charter. It was not supposed to have any legally binding effect. However, the member states were by no means agreed upon the definition’s meaning. Some states thought it had binding authority, while others thought it was advisory only.

One of the weaknesses of this resolution is that crimes of aggression were treated from a traditional inter-state perspective. Nations seemed to have forgotten, or chose to overlook, the fact that the 1946 General Assembly mandate was to draft a definition, not only serve as a guide to the Security Council. The emphasis was on international state responsibility, in opposition to individual criminal responsibility.

As the Security Council is essentially a political body with no special competence to conduct criminal trials, the question of punishment remained unsolved. The definition does not give any suitable guidance in questions concerning conditions for liability to punishment, hereunder about an individual's access to plead reasons for impunity.

The definition was debated for years, and it is not universally accepted. It is doubtful whether all of the elements contained in it can now be considered as forming part of customary international law, and whether all acts contained therein already *de lege lata* involve individual criminal responsibility.

The 1974 *Definition of Aggression* and the 1970 *Declaration on Friendly Relations* have been supplemented by the 1987 *Declaration on the Non-Use of Force*.<sup>10</sup> This includes the prohibition of “*economic, political, or any other type of measures to coerce another State*” for the purpose of securing advantages of any kind.

In December 1989, 26 years after the ILC provided its draft statute for an international criminal court, the General Assembly renewed the ILC mandate to continue its work on the project. The work of the ILC was accelerated by the Security Council's establishment of the International Criminal Tribunal in Yugoslavia.

#### 2.10.5 The practice of the Security Council

During the Cold War, the Security Council was paralyzed by vetoes of the United States and the Soviet Union. Aggression performed by the two superpowers during this period was never declared illegal, such as US invasions in Latin-America, Soviet invasions in neighboring countries, and both states' actions in Korea and Vietnam.

With the end of the Cold War, the Security Council became more active. Since 1988 the Council has initiated more peacekeeping operations than in the previous forty years. The Council imposed sanctions on nine regimes in four years, between 1990 and 1994: Iraq, Yugoslavia, Libya, Cambodia, Somalia, Liberia, Rwanda, Haiti and Angola. After

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<sup>10</sup> General Assembly Resolution 42/22 1988

1994, the Council has imposed sanctions on inter alia Sudan, Afghanistan, Ethiopia and Eritrea, and Liberia.

The political difficulties related to characterizing a state's conduct as aggression are illustrated by the practice of the Security Council. The Council has been extremely reluctant to find that an act of aggression has occurred. It has confined to determining the existence of a threat against international peace and security, which by itself is enough to provoke peace establishing efforts after the UN Charter chapter VII. Even when Iraq attacked Kuwait in 1990, the Council did not use the term *aggression*; it only condemned the illegal invasion and occupation. By the year 2000 the Council had found that an act of aggression had occurred in Rhodesia, South Africa, and Israel.

Armed violence between rival nationalistic and ethnic groups in former Yugoslavia and the genocide in Rwanda in the early 1990's, made clear the general need for an international criminal court when national legal systems break down or fail fundamentally. The Security Council did not have the authority to establish a permanent criminal court. The Council is however authorized to establish subsidiary organs for the performance of its functions, according to article 29 of the Charter.

The decision to create the International Criminal Tribunal of Yugoslavia (ICTY) was taken by the Security Council in 1993. The Council then asked the Secretary General of the United Nations to prepare a report on the creation of a tribunal, and to write its statute. This was the first truly international criminal court since Nuremberg. The crime of aggression was not included in the statute, although the Federal Republic of Yugoslavia and Croatia had provided substantial assistance to the Bosnian Serbs and Bosnian Croats in their struggle against the Government of Bosnia-Herzegovina.

The genocide in Rwanda in 1992, causing approximately 500,000 lives, called for the creation of the Rwanda Tribunal (ICTR). This was established by the Security Council in 1994. The statute was drafted by the United States and New Zealand, with input from Rwanda, which at the time was a member of the Security Council.

The ICTY and ICTR differ from the Nuremberg and Tokyo tribunals as they were established by a United Nations organ, and not by the victorious parties of the war. The Security Council has been criticized for being selective when establishing these tribunals. The Council created a tribunal for Rwanda, but it has failed to do the same in neighboring Burundi or Congo.

The Security Council passed three resolutions in 1998 in response to events in Kosovo; resolutions 1160, 1199 and 1203. These were chapter VII resolutions, and they expressed that there existed a threat to the peace. However, it is clear that these resolutions did not expressly authorize the use of force, nor did the words of the resolutions amount to an implied authorization of force. A new Security Council resolution authorizing armed action by NATO faced a near-certain Chinese or Russian veto. This led to the NATO decision to act without explicit UN approval.

Several states seemed to argue that the resolutions nevertheless justified the NATO action, as the human rights violations in Kosovo were horrendous, and something had to be done. The ICTY has refused to indict NATO leaders, despite criticism from Human Rights Watch and Amnesty International. Yugoslavia challenged the legality of the NATO action by bringing cases against ten NATO member states before the ICJ.

#### 2.10.6 The practice of the International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Its statute restricts its jurisdiction to disputes between consenting states. In accordance with article 65 of its statute, the ICJ *“may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”*.

The International Court of Justice has considered issues relating to aggression in three contexts. The first is in relation to the functions of the principal organs of the United Nations, such as considering which organs can determine the existence of aggression. To date, the International Court of Justice has avoided a categorical answer to the question as to whether it may allow judicial review of Security Council decisions. But

the Court did make it clear in its discussion in the *Nicaragua* case<sup>11</sup> that it does not regard itself as excluded from deciding on cases involving ongoing armed conflict, including decisions as to collective self-defense.

The second is dealing with requests for temporary measures to prevent alleged acts of aggression from worsening the legal dispute referred to the Court. The third is cases before the Court involving an alleged unlawful use of force or act of aggression committed by a state.

In the *Nicaragua* case, Nicaragua claimed that the United States had used direct armed force against its territory inter alia by laying mines in Nicaraguan internal and territorial waters, attacking and damaging Nicaraguan ports, oil installations and a naval base, and giving assistance to Nicaraguan guerillas fighting to overthrow the government. The Court here asserted its right to resolve any legal questions, but it seemed to have some sympathy with the argument that determinations of aggression under article 39 of the United Nations Charter could be dealt with only by the Security Council. The Court said that the Security Council had only primary, not exclusive, authority under article 24 of the Charter.

As the United States had made a reservation to its acceptance of the jurisdiction of the ICJ, excluding disputes arising under a multilateral treaty, the ICJ determined that it lacked jurisdiction to try issues based on the UN Charter. However, the Court determined that it had jurisdiction over questions of customary law.

The ICJ in the *Nicaragua* case ruled that an attack must “*occur on a significant scale*” in order for it to be aggression. The *Nicaragua* case confirms that the giving of assistance to rebels may be an indirect use of force contrary to customary international law. In para. 199, the Court stated that there is no rule in customary international law permitting the exercise of collective self-defense in the absence of a request by the state which is the victim of an armed attack. The Court also considered and rejected the idea

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<sup>11</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua ICJ Reports (1986)

that there was a right of intervention to support the “*political or moral values*” of a rebellion (para. 206).

## 2.11 The International Law Commission Draft Code

Following the adoption of the 1974 General Assembly definition, a second phase in the work on the Draft Code on Crimes against the Peace and Security of Mankind was started. In 1991, the International Law Commission provisionally adopted on first reading the articles of the draft Code. It thereafter transmitted it, through the UN Secretary General, to governments for their comments and observations. The draft Code was thereafter completed in 1996, after 48 years, when the ILC adopted the final text of the draft Code.

The draft listed five categories of crimes that the Commission felt threatened the peace and security of mankind, and should therefore be subject to international criminal jurisdiction. Aggression led the list. The Commission turned all acts of aggression, as defined by the General Assembly, into crimes against the peace and security of mankind, adding the threat of aggression as well. The other crimes were genocide, crimes against humanity, war crimes, and crimes against United Nations personnel. Article 1(2) of the draft Code states that crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

While the 1974 General Assembly resolution defined aggression for the purpose of guiding the Security Council, the ILC draft Code of 1996 attempts to establish individual criminal responsibility for aggression. The Commissioners concluded that 50 years after Nuremberg it would be retrogressive to exclude individual responsibility for the crime of aggression. However, the ILC described the crime of aggression as a customary law crime, and explicitly decided not to propose a general definition of the crime. It upheld the Nuremberg principles and confirmed that crimes of aggression were punishable under international law.

The ILC took the view that it should be left to practice to define the exact contours of the concept of crimes of aggression, war crimes and crimes against humanity, as identified in article 6 of the Nuremberg Charter. The crime of aggression is provided for in article 16 of the draft Code. This states that

*“An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.”*

The draft Code commentary states that the expressions *leader* and *organizer* taken from the Nuremberg Charter are to be given a broad meaning. They include not only members of a government, but also individuals in the military, the diplomatic service, political parties, and business who by rank and authority could be effectively involved in the commission of aggression. The ILC also noted that individual criminal responsibility attaches only if the person in question participated in an act of aggression intentionally and knowingly.

Most importantly, the ILC emphasized that individual responsibility for the crime of aggression is *“intrinsically and inextricably linked to the commission of aggression by a State”*. Aggression by a state is thus a prerequisite condition for individual responsibility for the crime of aggression. The ILC recognized that nations are abstract entities that can act only through individuals;

*“A State can commit aggression only with the active participation of the individuals, who have the necessary authority or power to plan, prepare, initiate or wage aggression”*.

According to the ILC, any court determining individual responsibility for an act of aggression would have to consider two related issues: First, whether the conduct of the state constitutes a violation of article 2(4) of the UN Charter, and, second, whether such conduct *“constitutes a sufficiently serious violation of an international obligation to qualify as aggression entailing individual criminal responsibility”*. The ILC concluded



that the Charter and Judgment of the Nuremberg Tribunal are the main sources with regard to individual criminal responsibility for acts of aggression.

As an added safeguard, and to make the Code acceptable to the five permanent Security Council members, it was agreed that no individual could be convicted of aggression unless the Security Council had found, acting according to its UN Charter responsibility under article 39, that aggression by a state had occurred.

## 2.12 The International Criminal Court

As stated earlier, the ICJ can only deal with legal disputes between consenting states, it does not have the authority to hear criminal charges against individuals. Neither can the Security Council convict individuals, it can only decide on the existence of aggression performed by states. The UN Charter's chapter VII powers gave the Security Council the opportunity to create the two ad hoc tribunals ICTY and ICTR, after the tragedies had occurred. These can only punish a limited number of crimes committed in a limited area during a limited period of time. The assurance of universal justice can only be done by a permanent international criminal court. The Security Council does not however have the authority to establish a permanent court. This had to be done in a treaty.

The International Law Commission was given the task to prepare a draft statute for the ICC as a basis for the negotiations. A first draft was completed in 1992. This was transmitted to the General Assembly in 1993. On the basis of comments made by UN member states, a revised draft statute was completed in 1994. It provided that aggression would be one of the crimes within the Court's jurisdiction.

The war crimes trials in Nuremberg, Tokyo and elsewhere, the 1974 definition of aggression, and the two Security Council tribunals were foundation stones in the making of the statute of the International Criminal Court. In 1995, a Preparatory Committee on the Establishment of an International Criminal Court was established. The draft statute was supplemented by the 1996 ILC code of crimes.

The draft statute of the ICC was debated at a diplomatic conference in Rome in 1998. The text of the draft statute submitted to the Conference contained three possible definitions of aggression. One was based on the Nuremberg definition of crimes against the peace, a second was modeled after the 1974 General Assembly definition, and a third essentially limited the crime to an “*armed attack*” by one state against another that resulted in occupation or annexation of territory. The aim was to target individuals who are responsible for acts of aggression. That will usually be the highest military or political leaders – in contrast to other persons who easier can be targeted by the remaining categories of crimes.

The proposal to include crimes of aggression in the material competence of the Court created significant disagreement in the preparations for and during the diplomat conference. A line of states, with Germany in front, argued that the omission of this crime would mean a step backward for the international law in relation to the Nuremberg Tribunal’s statute, which included the crime of aggression in its jurisdiction. Others were skeptical, as they were worried about the political aspect of the crime of aggression.

The United States showed little enthusiasm for inclusion of the crime. The European Community and the Non-Aligned Movement (an organized movement of nations created in 1961, attempting to form a third world force through a policy of non-alignment with the United States and the Soviet Union) were among those that insisted that without the inclusion of aggression as a crime, they would be unable to support the new court. Many Arab states wanted the 1974 General Assembly definition – with possibly some improvements in their favor – included in the statute.

The negotiations circled around two alternative approaches: Either a synthetic, general definition or a casuistic approach, which again either could consist of an exhaustive enumeration or an illustrative exemplification of types of aggression. On the German side it was both before and during the diplomat conference suggested a short definition that still satisfies the minimum requirements of the principle of legality. To achieve this,

it was agreed to limit the reach of the definition to the most obvious and indisputable offensive actions.

Further, the German proposal for a definition focused on attacks against a state's territorial integrity. The German effort undoubtedly implied that the international society during the negotiating process had come closer to a definition of the criteria that are necessary to state individual criminal responsibility for crimes of aggression. However, no agreement was reached on the German proposal.

Until the very end of the conference, it looked as though the crime of aggression would be dropped and not included in the statute. The main reason given by states not to include the crime of aggression was that there was not a definition of aggression that was agreed upon, and it was feared that any role for the Security Council might destroy the independence of the Court. Some state parties feared that the disagreements concerning aggression would jeopardize the whole convention.

In the end a compromise was reached whereby aggression was included in the Court's jurisdiction with the condition that the Court will not be able to exercise jurisdiction over this crime until a definition is reached, and conditions for exercising jurisdiction are adopted in accordance with articles 121 and 123, concerning amendments of the statute.

The ICC jurisdiction over crimes of aggression is therefore actually an illusion. The process of defining aggression promises to be an extremely long one, in view of the complex and time-consuming procedures provided for in the statute, and the controversies surrounding the definition of aggression. It has been argued that the inclusion in name only of aggression is only a gesture of good-will to interested countries, and as a hope for the future.

The statute was adopted at The Rome Conference in 1998, limiting the jurisdiction of the Court to genocide, crimes against humanity, war crimes, and crimes of aggression once aggression has been defined. The Final Act of the Rome Diplomatic Conference in

resolution F(7) established a Preparatory Commission which inter alia shall prepare proposals for a provision on aggression. The Commission shall submit such proposals to the Assembly of States Parties at a review conference, where the state parties hopefully will agree on a definition of the crime of aggression for inclusion in this statute. However, the new provision has to be approved by 7/8ths of the parties, and a dissenting party can immediately withdraw from the statute.

The first review conference of the statute is to be held seven years after its entry into force. Even once this date arrives, there is no reason to believe that reaching an agreement on the issue will be any easier than it has been in the past. This failure of the treaty is particularly regrettable as the offence of aggression by its nature transgresses national barriers affecting the peace and security of mankind, and is therefore particularly suited to prosecution by an international tribunal.

Opponents to the inclusion of the offence have argued that it smacks of victor's justice and would undermine the ICC's credibility as an independent court. But on the other hand, the offence fell within the jurisdiction of the Nuremberg Tribunal, and it is an essential tool to deter serious criminal behavior.

The problem concerning which body of law should determine the existence of aggression was also debated at the conference. Article 23(2) of the ILC draft Statute states that

*“A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint”.*

No agreement was made concerning this at the conference. Thus, this will also be debated by the working group on the crime of aggression.

The ICC had its official opening on March 11, 2003. At this time, 89 states had ratified the statute. These did not include the United States, Russia, China, or India. The United States claimed that the Court could become a tool for pursuance and harassment of

American citizens because the country has significant military and civil presence around the world. The United States has therefore established bilateral agreements concerning immunity for their citizens.

### **3 The current state of the law**

#### **3.1 Introduction and problem**

The Nuremberg and Tokyo trials and certain other military tribunals after the Second World War have been the only instances of criminal prosecution and punishment of individuals in respect of crimes of aggression. There has not been a single case of prosecution for instances of resort to armed force after the Second World War trials, either on the domestic or the international plane. Because of this it has been argued that the concept of crimes of aggression has been substantially weakened. This view appears to be reinforced by the non-inclusion of the crime of aggression under the jurisdiction of the International Criminal Tribunal for Former Yugoslavia.

Two main objections are brought forward against the existence of the crime of aggression. Firstly, that there is no crime of aggression under customary international law. However, this customary law has existed at least since Nuremberg. Secondly, that there is no need for the crime of aggression, as an offender of the crime will most likely be guilty of one of the Court's other three core crimes. This clearly disregards the value of a criminal prosecution of aggression itself.

The lack of any prosecutions for resort to force other than those after the Second World War, demonstrates a reluctance to attribute individual criminal responsibility for the crime of aggression. This reluctance appears to be due to the difficulties concerning a definition of aggression, which is necessary in order to state the occurrence of aggression. Also, the rights of the Security Council as they follow from the UN Charter chapter VII make it difficult to determine the occurrence of aggression, as the five permanent members of the Council have a right to veto any such finding.

Further, the tendency not to prosecute crimes of aggression is related to the nature of the crime. War crimes, crimes against humanity and genocide consist of acts which are easy to identify. The perpetrators and victims are identifiable, and the core element of the crime is usually an offence punishable by domestic law, for instance murder. The case of crimes of aggression, on the other hand, is different.

The acquisition of evidence about an individual's planning, preparation, initiation and waging of aggression is extremely difficult, given the secrecy surrounding government decision-making. When force has been used, its lawfulness needs to be examined. As the decision to prosecute or not is basically a political one, there is a substantial reluctance to submit questions on the use of force to judicial examination. It is also difficult to arrest the defendants. Obtaining custody of a defendant may require either his removal from power or the co-operation of other states.

The Cold War was also a relevant factor. During the Cold War, the United States and the Soviet Union frequently committed crimes of aggression. The equal strength and weapon arsenals of these two superpowers made it difficult for other countries to accuse them of committing aggression. International law is the law of the strongest. No state would risk becoming an enemy of either one of the two superpowers. The fall of the Soviet Union, causing the United States to remain the only superpower, has in some ways made the situation easier. The Security Council is no longer paralyzed by vetoes.

However, it can also be argued that the situation is more complicated now. The United States has on several occasions invaded countries without a Security Council resolution, such as the recent invasion of Iraq. And no country in the world has the power to stop United States invasions. For the first time since the peace of Westphalia in 1648, when the modern state system was created, there is only one superpower in the world. A state exists which is not challenged by the existence of at least one other state, and there is thus no longer a balance of power in the world.

There is presently no definition of aggression that is agreed upon. There are also problems concerning who should state the occurrence of aggression. This could either be done by the Security Council, which is a political organ, or the International

Criminal Court, which is an independent court. No agreement has been made on this so far. As the ICC statute does not define aggression, it is doubtful whether its article 5 concerning crimes of aggression can give rise to individual criminal responsibility at the present time. The three central problems of the *jus ad bellum* are thus how to define crimes of aggression, deciding on who should be competent to determine the existence of aggression, and to establish individual criminal responsibility for violations of the crime of aggression.

### 3.2 The contemporary prohibition of the use of inter-state force

#### 3.2.1 Treaty law

It has been debated whether the Kellogg-Briand Pact is still in force. This is however not particularly relevant. Even if it is still in force, the United Nations Charter is legally the equal of the Kellogg-Briand Pact, and has replaced it.

The Charter of the United Nations prohibits the use of force. However, it does not state individual criminal responsibility. States are the principal subjects of international law, while individuals as a main rule are mere objects and thus not capable of bearing rights and duties under international law.

#### 3.2.2 Customary international law

The general prohibition of the use of inter-state force has been debated by the International Court of Justice. Although article 2(4) of the United Nations Charter prohibits the use of force by member states only, the *Nicaragua* case<sup>12</sup> confirmed that this is a rule of customary international law that applies to all states.

The ICJ in the *Nicaragua* case ruled that questions of the use of force by states are justiciable matters, i.e. that such cases can be tried before a court. This was also stated

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<sup>12</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua ICJ Reports (1986)

in the Nuremberg tribunal, and has probably become customary law. In Nuremberg and Tokyo, individuals were convicted for the crime of aggression. The findings in these judgments may have developed into becoming customary law.

### 3.2.3 Jus cogens

Article 53 of the 1969 Vienna Convention on the Law of Treaties addresses the subject of jus cogens. According to this, a treaty is void if, “*at the time of its conclusion, it conflicts with a peremptory norm of general international law*”. For a norm to qualify as peremptory, it has to be one “*accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*”.

The ILC in its commentary on the draft of the Vienna Convention identified the United Nations Charter’s prohibition of the use of inter-state force as “*a conspicuous example*” of jus cogens.

### 3.2.4 The International Criminal Court

Aggression is a crime within the ICC’s jurisdiction. The Court thus acknowledges aggression as an international crime. However, according to article 5(2) of the statute, the Court cannot convict violations of this crime until a definition has been agreed upon. But the fact that article 5(1)(d) provides that the crime of aggression is an international crime subject to the jurisdiction of the Court, creates the expectation that the state parties will strive to find an acceptable definition.

## 3.3 Definition of the crime of aggression

The principle of legality promises that individuals can only be punished for actions that were illegal when they were committed. The lacking level of preciseness in the present elements of the international law to a definition of aggression, raises difficulties related to the demands for predictability and clearness that follow the principle of legality in the criminal law. The international community has been attempting to define crimes of



aggression for the purpose of establishing individual criminal responsibility ever since the Nuremberg Judgment. The 1974 definition has not been employed in criminal proceedings, and only a few times by the Security Council. The ILC in 1996, after 50 years of work, simply included the crime, undefined, in the draft Code of Crimes.

The importance of defining aggression is related to it being the arch-crime which most threatens international society. At Nuremberg it was regarded as the “*supreme international crime*”. The Nuremberg Tribunal used the expression *crimes against peace*. According to article 6(a) of the Nuremberg Charter, *crimes against peace* means a war of aggression, or a war in violation of international treaties. The Charter does not however specifically define aggression. It also only dealt with *wars* of aggression, and thus has been criticized for being too narrow, as it did not include aggression below the threshold of war. The Nuremberg Charter also built on an established situation, after aggression was determined by the allied powers.

When the victorious parties of the Second World War created tribunals to convict the leaders of the axis powers, they did not see the need for a precise definition of the crime of aggression. They were content to allow a court to determine the law of other states. However, when there is the possibility of the court exercising its jurisdiction over its creators, definitional precision is insisted upon. The same states that established the Second World War tribunals are unwilling to give the ICC the power to make law binding on themselves without a clear definition of aggression. The possibility of leaving definitions to the court was omitted from the ILC draft statute of the ICC for precisely the reason that doing so would amount to giving the court too much legislative power.

To define aggression means, among other things, to decide whether so-called pre-emptive self-defense and humanitarian intervention are lawful actions under the United Nations Charter, or must instead be regarded as a form of aggression. This has especially been argued as legal uses of force by the United States. At the Rome conference, the United States insisted on immunity for acts of humanitarian intervention.

According to article 17 of its statute, the ICC is a subsidiary court – it will only prosecute cases where the national courts in the individual's country are unable or unwilling to try the offenders in a fair trial. Therefore, if no definition is agreed upon by the state parties of the ICC, a solution could be that the states themselves define aggression, since they will be the ones who primary convict cases of aggression.

It can be questioned whether an exact definition of aggression is desirable. An enumerative list of cases of aggression might contain gaps which would encourage the aggressor to exploit the definition. This could provide a trap for the innocent and a signpost for the guilty. This was the reason given by the ILC as to why it in the draft Code did not to propose an exact definition of aggression.

### 3.3.1 The objective determination of aggression

The objective determination of aggression concerns what criteria are to be considered, both as regards an instance of use of force by a state, and the precise involvement of an individual in making this use of force possible. The meaning of *aggression* was originally military attack by the armed forces of a state against the territory or vessels of another state. In this sense it was a neutral term relating to military tactics, and it was often used together with other terms which imported a moral or legal element. After 1920 aggression became a legal concept and a synonym for the illegal use of force, this being understood primarily as an invasion of territory.

The ILC in the 1996 draft Code turned all acts of aggression into crimes against the peace. The Nuremberg and Tokyo Judgments and state and judicial practice following the Second World War seem to suggest three cumulative criteria for the specific use of force by a state to be determined as aggression.

The first criterion is the unlawfulness of a specific resort to force. Whether a particular use of force is in fact unlawful, depends on an evaluation of the justification offered by the state resorting to it. This evaluation is based on what international law lays the requirements to be for lawful resort to force, and this is mostly a question of customary law. The only lawful resorts to force according to the UN Charter, are actions approved

by the Security Council, and self-defense. The tendency in state practice after 1945 has been to expand the lawful resort to force, either by interpreting article 2(4) of the UN Charter widely, or stating anticipatory self-defense or introducing new exceptions to the prohibitive rule, such as humanitarian intervention or armed action in furtherance of Security Council resolutions adopted under chapter VII of the Charter. The latter was done in Kosovo in 1999.

The second criterion is bad faith manifested by a state that resorts to armed force. This is when the government of a state with deliberate intent does not to accept a resolution concerning a dispute. The state instead appears to act either by ignoring the settlement of a particular dispute or extracting it, under a threat to resort to force, with a view of using it to advance further aggressive aims. This was done e.g. by Italy towards Ethiopia in 1936, and by Germany towards Czechoslovakia in 1939. The existence of bad faith has been determined objectively on the basis of the relevant states' practice following attempts to settle a dispute or to maintain international peace.

The third criterion is the escalating effect of the use of force by a state. The 1974 definition of aggression makes no provision of particular intensity of the use of force. However, in the *Nicaragua* case<sup>13</sup>, the ICJ ruled that the use of force by guerrillas may be of the "*scale and effects*" so as to constitute an armed attack.

### 3.4 The personal competence to determine the existence of aggression

The personal competence concerns which organ shall be given the authority to determine the occurrence of aggression and an individual's involvement therein. This could be done either by a political organ, such as the Security Council, or a judicial body, such as the ICC. This question became prominent in the course of the drafting of the ICC statute. The ILC draft statute which gave the Security Council the authority to determine the existence of aggression was supported by all five permanent members of the Security Council, but also by other states. The opposite view, which also was

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<sup>13</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua ICJ Reports (1986)

supported by a number of states, jurists and the judges of ICTY, was to give the ICC an equal and autonomous role. There was however a general agreement at the conference that the independence of the Court somehow must be assured.

There was no doubt at the Rome conference that article 39 of the United Nations Charter gives the Security Council the right to determine whether a state has committed an act of aggression. According to the system of the UN Charter, the Council has the superior responsibility for the maintenance of international peace and security, and the right to determine whether there is a situation of aggression. The Council can according to this characterize a situation between states as aggression, and thereafter adopt economical or other sanctions and any potential military efforts of restraint against the state(s). The Council does not however have the authority to judge the responsibility of individuals for crimes of aggression.

The exclusive authority of the Security Council to determine the existence of aggression would subject a substantial part of the element of the crime of aggression to the political climate existing in the Council. The Security Council, being a political organ, is not independent, and it has some of the most powerful states in the world as permanent members with the right to veto any decisions.

The problem rises when the Council, for whatever reason, fails to make any determination that aggression by a state has taken place. This can happen either because one of the five permanent members vetoes such a finding, or because the Security Council fails to act. Many countries, including the United States, feel that that ends the matter. Others believe an independent judicial finding of individual criminal liability could be made, even if the Security Council does not find that a state has engaged in aggression. They feel that a Security Council veto would effectively block the ability of the ICC to punish aggression.

Those wanting to give the ICC an autonomous role, based their opinion on the fact that it may be impossible for the ICC not to evaluate a charge of aggression. A defendant may claim to his defense that his state did not commit aggression, and thus he cannot be convicted for a crime of aggression.

### 3.5 The Preparatory Commission Working Group

The Preparatory Commission in August 1999 agreed to the setting up of a working group on the crime of aggression. It was directed to prepare proposals for a provision on aggression and its elements (a legal question) as well as for the conditions under which the Court could exercise jurisdiction with regard to that crime (a political question).

During the debates on defining aggression, Russia proposed a simple one-sentence definition saying: *"the crime of aggression means any of the following acts: planning, preparing, initiation, carrying out a war of aggression"*. Colombia agreed on an Italian proposal on methodology and proposed a general definition that would provide more flexibility than a detailed list. Greece and Portugal submitted a brief proposal based on the broad generic terminology of the 1974 General Assembly resolution. Germany proposed several compromises that relied on the most important parts of the Nuremberg precedents, the 1974 resolution and the mandates of the United Nations Charter. Iran, on behalf of some 30 Arab and African states, stressed the importance of retaining the 1974 resolution.

Arab and African states sought a stronger condemnation of foreign domination, annexation or occupation. The United States insisted on immunity for acts of humanitarian intervention. Permanent members of the Security Council refused to diminish their privileged powers. However, there was a general agreement that somehow the independence of the Court must be assured.

The latest developments were made by the Preparatory Commission in its report of 24 July, 2002. As the crime of aggression differs from the other crimes within the Court's jurisdiction, the statute's requirements for individual criminal responsibility shall not apply to this crime. This is stated in paragraph 3 of the report. The requirements for individual responsibility for the crime of aggression are stated in paragraph 1 of the report:

*“For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.”*

The Commission also considers including as a requirement that the attack constitutes a war of aggression, or that the object or result of the attack is military occupation or annexation of the territory of a state.

Paragraph 2 states that

*“For the purpose of paragraph 1, “act of aggression” means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,”*

(option 1) *“in accordance with paragraphs 4 and 5”.*

(option 2) *“subject to a prior determination by the Security Council of the United Nations”.*

The most controversial issue dealt with by the Preparatory Commission, was specifying which body will make the determination that a state has committed an act of aggression. Cameroon proposed that when the Security Council fails to make any determination that aggression by a state has taken place, the ICC after a reasonable period of time could commence its investigation of the crime. Egypt suggested that the ICC might be able to turn for help to the ICJ for an advisory opinion, or to the General Assembly for authorization under *Uniting for Peace* precedents that allow the Assembly to intervene if the Council becomes disabled.

Paragraph 4 of the 2002 report states that the ICC shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the

state concerned. If no such determination exists, the Court shall notify the Security Council of the situation before the Court so that the Council may take action:

(option 1) under article 39 of the UN Charter, or

(option 2) in accordance with the relevant provisions of the UN Charter.

The Commission has in paragraph 5 of the report come up with five alternative options when the Security Council does not make a determination as to the existence of an act of aggression by a state (or invoke article 16 of the statute within six months from the date of notification):

Option 1: The Court may proceed with the case.

Option 2: The Court shall dismiss the case.

Option 3: The Court shall request the General Assembly to make a recommendation.

Option 4: The Court may request either the General Assembly or the Security Council, acting on the vote of any nine members, to seek an advisory opinion from the International Court of Justice on the legal question of whether an act of aggression has been committed by the state concerned. If the ICJ finds that a state has engaged in aggression, the ICC prosecutor can proceed against individuals in that state for the crime of aggression.

Option 5: The Court may proceed if it ascertains that the ICJ has made a finding in proceedings brought under chapter II of its statute that an act of aggression has been committed by the state concerned.

The work on the crime of aggression has definitely come further with this report. Paragraph 1 of the report states clear requirements for individual responsibility. However, the 1974 General Assembly definition is ambiguous, and gives the Security Council too much power. Paragraph 2 should thus be amended. The five different options in paragraph 5 demonstrate the problems on agreeing on the personal competence to determine the existence of aggression. This work will without any doubt take a long time.

### 3.6 Conclusions

#### 3.6.1 The definition of aggression

Skilled lawyers should be able to define the crime of aggression in a way that will be clear, binding and fair. The crime of aggression has been an international crime with individual responsibility since 1945, based on the Nuremberg Judgment. The United Nations has affirmed the Nuremberg principles, so it should be possible to prosecute individuals for crimes of aggression based on these. However, the tribunals were heavily criticized as they did not specifically define aggression. This should therefore be done.

A general definition would probably be better than an enumerative one, as an enumerative definition cannot possibly comprise the range of imaginable situations. The definition should be general enough to comprise the range of imaginable situations, but precise enough to meet the requirement of the principle of legality. The definition should also reflect customary law.

As the 1974 General Assembly definition is ambiguous, the best solution would probably be to write a new definition. Professor Marjorie Cohn, at the Thomas Jefferson School of Law, has proposed a definition of aggression for the use of the International Criminal Court. The definition reads:

*“Aggression is any invasion, attack, bombardment, or use of any weapons by the armed forces of State A against the territory of State B, which is neither authorized by the Security Council of the United Nations, nor done to repel a danger of imminent attack of the borders of State A by State B”.*<sup>14</sup>

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<sup>14</sup> Marjorie Cohn: *The Crime of Aggression: What is it and why doesn't the U.S. want the International Criminal Court to punish it?*



This is a simple and clear definition. However, it was extremely difficult, and it took several decades to come up with the 1974 definition. It is most unlikely that significant changes can be adopted quickly by all parties to the Rome statute. Therefore, the most realistic approach would be to use the 1974 definition as a starting point. The 1974 definition was intended only as a non-binding guide to the Security Council, and it is doubtful whether all acts contained in it involve individual criminal responsibility.

However, the preamble of the definition stated that its purpose was to deter a potential aggressor. The definition has also been widely approved and accepted, although when it was adopted, the majority of states took a critical position. The definition is ambiguous, but it was the open nature of the definition that allowed its adoption. The few ambiguous clauses that were inserted in this definition to achieve consensus should however be deleted. The provisions in article 7 seem to allow unrestrained violence to cope with political problems that experience has shown can only be resolved by peaceful means. The rights given to the Security Council in articles 2 and 4 should also be deleted, as they could jeopardize the independence of the Court.

The 1974 definition does not state the requirements for individual responsibility. These are however stated in article 1 of the 2002 Preparatory Commission report, which should be included in the definition. The Nuremberg precedents may give some guidance concerning this.

Not all uses of force that are inconsistent with the UN Charter should be included in the definition. This could degrade the concept of aggression, and also aggravate what may be a minor dispute, and thus make it more difficult to resolve. The definition should therefore state that a certain magnitude of the use of force is necessary. The Preparatory Commission has stated this in article 1 of its report; only a “*flagrant violation*” of the UN Charter will constitute a crime of aggression. This should however not be as narrow as the Nuremberg Charter, which only included *wars* of aggression.

It might be a good idea if the definition specifies that humanitarian intervention and preemptive actions are illegal uses of force. Humanitarian intervention should only be allowed when authorized by the UN Security Council, and not as self-defense. Stating

this could prevent United States invasions under the guise of humanitarian intervention and preemptive actions, when the real motive is the desire for US hegemony over other regions, and frequently, over their oil resources. Humanitarian interventions and preemptive strikes are already illegal uses of force under the UN Charter, which only allows self-defense to prevent an armed attack. However, specifying this in the definition might prevent wide interpretations of article 51 of the UN Charter.

The foundation stones for the definition of aggression should thus remain the Nuremberg precedents, the United Nations Charter, the 1974 General Assembly definition, the recommendations of the International Law Commission, the Rome statute, and the report of the Preparatory Commission.

### 3.6.2 The personal competence to determine the existence of aggression

In addition to a definition of aggression, the conditions under which the ICC shall exercise jurisdiction with respect to this crime have to be agreed upon. In order to efficiently be able to convict all crimes of aggression, the ICC should be free to decide when an individual has committed a crime of aggression. Only an independent court can determine the guilt or innocence of individual perpetrators. The role of the Security Council is to determine when aggression by a state has occurred.

Security Council decision-making is to a large extent inspired by political considerations. To label a state an aggressor means to condemn its behavior. This might undermine or contradict the Security Council's role in offering its good offices. The Security Council is also composed primarily of those states which have the capacity, and therefore the temptation, to commit aggression. There is therefore a need to break the Council's sole right to determine aggression. Otherwise, none of the permanent member states of the Council will ever be accused by the United Nations of committing aggression, and thus no individuals from these states will ever be punished for such crimes.

The UN Charter article 39 gives the Security Council the authority to determine the existence of any acts of aggression. The UN Charter can only be modified by an

amendment of the Charter itself, not by any criminal statute. All five permanent members would have to consent to any amendment, which makes this unlikely at the present time. However, the General Assembly can act when the Security Council refuses to do so. This is based on the 1950 *Uniting for Peace* resolution.

Several nations fear that allowing the ICC to initiate investigations into crimes of aggression without a prior Security Council determination would open for politically motivated state complaints. However, a crime of aggression will not often happen alone. It will usually be accompanied by other international crimes, such as severe war crimes, which fall within the jurisdiction of the ICC. Politically motivated complaints can be prevented by allowing, in the absence of Security Council action, the General Assembly to ask the ICJ to determine whether an act of aggression has been committed by the state concerned.

The ICJ is an independent court that deals with legal disputes between states, and does not have the authority to hear criminal charges against individuals. But the ICJ can determine whether a state has engaged in aggression. If the ICJ determines that a state has committed an act of aggression, the ICC prosecutor should be allowed to continue its investigations against individuals in that state for the crime of aggression.

### 3.6.3 Individual criminal responsibility for crimes of aggression

Ever since the United Nations was created, it has sought to establish an international criminal court to convict individuals for international crimes. The crime of aggression was supposed to be within the court's jurisdiction. The work on the creation of a criminal court was postponed until a definition of the crime of aggression was agreed upon, as this was viewed as an important part of the court's jurisdiction. Now that an international criminal court finally exists without the ability to convict individuals in violation of the crime of aggression, a large portion of the purpose of the court is not being fulfilled.

The United States and Great Britain have ideas concerning a military court modeled after the Nuremberg Tribunal. This would however be a giant step backward compared to the present International Criminal Court. The point is to avoid victor's justice. The Security Council is an important guarantor that the ICC will achieve a broader international credibility and legitimacy than a military tribunal could ever get.

Article 23 of the ICC statute states the *nulla poena sine lege* norm: "*A person convicted by the Court may be punished only in accordance with this Statute*". But the inclusion of crimes of aggression in article 5 of the ICC statute means that it is recognized as an international crime subject to the Court's jurisdiction. Further, individuals were punished for the crime of aggression by the tribunals following the Second World War. This may imply that a customary law has developed, stating individual criminal responsibility for crimes of aggression. The statute of the ICC does not change this customary law. In fact, according to article 21 of the ICC statute, the Court can refer to "*applicable treaties and the principles and rules of international law...*".

Most individuals can be convicted for war crimes and crimes against humanity. However, it is difficult to convict the responsible leaders behind the crimes. The refusal to convict individuals for the crime of aggression means to let the leaders walk free, while their subordinates get convicted. Heads of state and other leaders responsible for the supreme international crime will then remain immune from prosecution. The conviction of individuals in violation of the crime of aggression is therefore extremely important to prevent such crimes from happening, but more importantly to ensure that justice is served on the guilty.

Benjamin Ferencz, Nuremberg prosecutor, considers that there are four possible outcomes if no definition of aggression or the role of the Security Council is agreed upon<sup>15</sup>. The first is that the ICC will have no jurisdiction to deal with the crime of aggression, and heads of state and other leaders responsible for aggression thus will remain immune from prosecution. The second alternative is that when an aggressor is defeated, the guilty party may be tried by the victorious party. The third alternative is

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<sup>15</sup> Benjamin Ferencz: *Can aggression be deterred by law?* Pace International Law Review, fall 1999

that the criminals may be brought before an ad hoc tribunal created by the Security Council. But the Council can only do this after the crimes have occurred, and in limited areas.

The ICC statute seems to be an infinitely better way to proceed to a system of international justice than any other available choice. A permanent court with universal jurisdiction, able to convict all incidents of aggression is by no doubt the best solution. Why allow victor's justice, when the punishment of crimes of aggression can be done by an independent criminal court? This is Ferencz' fourth alternative, which he believes is most likely to produce the desired result; that the ICC

*“focusing on crimes of concern to the international community as a whole and acquiring jurisdiction only when national States are unable or unwilling to try the offenders in a fair trial, can try the accused in a public forum directed by carefully selected judges under the supervision and effective control of the international community”.*

It took decades to reach the 1974 definition of aggression, and thus it will probably take a long time to come up with a new definition, and the difficult political question to decide on the relationship between the ICC and the Security Council. In the meantime, the ICC should convict individuals for crimes of aggression based on the Nuremberg precedents, the 1974 definition, the UN Charter, the ILC drafts, and the report of the Preparatory Commission. This will guarantee the defendants a fair trial in conformity with the principle of legality. If the Security Council does not determine that a state has committed aggression, the General Assembly, based on Uniting for Peace precedents, should leave this question up to the ICJ. This way, fairness and security in the world will be fulfilled the best way possible.

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The United Nations Charter (1945)

The Nuremberg Charter (1945)

Convention for the Definition of Aggression (1933)

The Kellogg-Brian Pact (1928)

The Covenant of the League of Nations (1919)

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